The Central Law Journal.

ST. LOUIS, OCTOBER 18, 1889.

IT is interesting, to the student of constitutional law, to note some of the differences between the organic laws framed for the new States. The constitution makers of Washington seem to have taken ground, midway between the radicalism of Montana, and the conservatism of North Dakota. In respect to nine-tenths of its provisions, the constitution of Washington follows the beaten path, but its framers were not wholly averse to innovations, and adopted a few that are quite as radical as any found in the organic law of Montana. These relate, however, almost exclusively to the control of corporations. In all other respects, the constitution of Washington may be regarded as quite conservative. Unlike Montana, Washington does not require members of the legislature, before taking their seats, to make oath that they have not violated any election law, or given money or anything else to secure a nomination or election. Nor is there any provision making the trading of votes or log-rolling an offense. No limit is put to the sessions of the legislature. Special legislation is forbidden in a less number of instances than is usual in recent constitutions. Revenue bills may originate in either house and be amended in the other. Except in respect to control over corporations, the legislature of Washington will have wide discretionary authority and be subject to comparatively few constitutional limitations. The Montana provision, as to attempts by the governor to influence members of the legislature, by promising appointments to or removals from office, or threatening to use the veto power, is not found in the constitution of Washingington. Like Montana, however, Washington appears to have suffered from judicial absenteeism, and the constitution declares that a judge who shall absent himself from the State more than sixty days shall forfeit his office. There is a proviso, however, that in cases of necessity the governor may grant an extended leave of absence. It also contains a provision by which the legislature is authorized to establish a jury of less than twelve men in the lower courts, and to provide that nine or more jurors may render verdicts in civil cases. This new departure will be watched with general interest, and if it shall prove to work well, it will undoubtedly be copied by many of the other States.

IT is only in respect to corporations that the constitution of Washington has any radical innovations, but in this particular it is quite equal to the organic law of Montana. The leading principles of the interstate commerce act are planted firmly in the constitution and put beyond the reach of the legislature. The short haul rule is declared in terms so broad that it will apply, not only to railroads, but to steamboat and stage coach lines. The right to fix rates is asserted without qualification. Pools are forbidden, and fictitious stock or indebtedness declared void. Competing lines of railroad cannot be consolidated. The right of eminent domain is asserted over all corporate property to the same extent as over private property, and expressly extended to all telegraph and telephone companies. Stockholders in banking corporations are liable to double the amount of their stock for corporate debts. A bank officer who accepts a deposit, knowing that the bank is insolvent or in failing circumstances, is personally liable for the full amount. Stockholders in other than banking corporations are liable only to the amount of their unpaid stock.

As a whole, the constitution of Washington is decidedly conservative, though quite pronounced in the article dealing with corporations. Unlike North Dakota, it does not reserve full power to the legislature, in the confidence that it will be judicially exercised, but aims to place certain general rules, for the government of corporations, beyond the reach of the law-making body. In odd contrast, too, with Montana, this mistrust of the legislature appears only where corporations are concerned, and there seems little disposition to hedge in and limit the power of the law-making body in respect to other matters. In dealing with legislators, North Dakota displays generous and guileless confidence, and Montana strong suspicion and distrust, while Washington is willing to trust them except where corporations are concerned.

THE novelty of the Interstate Commerce Law renders each decision of the courts, construing its provisions, of interest and importance. The recent opinion of Judge Thayer of the United States District Court, overruling the motion for a new trial in the Tozer case, is an exhaustive and able presentation of the law in reference to illegal discriminations and preferences by railroad companies in the making of rates. It will be remembered that the jury, in the above case, found against the railroad company on most of the counts in an indictment, based on the criminal provisions of the above act. At the time, we published in full the charge of Judge Thayer, embodying the law applicable to the case, and the opinion to which we now call attention, contains little in addition to that admirable statement. But the court discusses one point urged for the first time on the hearing of the motion for a new trial, that no disparity, existing between the rate charged on the shipment originating at Hannibal, and the Missouri Pacific's proportion of the rate on the shipment from Chicago, can be alleged as a preference or discrimination, and hence as a violation of the third section of the act. In order to understand this point, it may be best to remind our readers that the act, complained of in the Tozer case, was in charging the Hayward Grocery Co. a higher rate per hundred pounds for the shipment of goods from Hannibal Mo. to Hepler Kansas, than was charged the C. B. & Q. R. R. Co. for the same distance on goods coming through from Chicago. It may be as well to quote the language of the court on this new point:

It is said that the one rate having been fixed by the Missouri Pacific Railway Co., alone between stations on its own line, and the other being its proportion of a joint rate, that the law does not allow any comparison between the two rates for the purpose of establishing a preference, and further that the public is in nowise concerned in the division of the joint rate as between the connecting carriers.

With reference to such contention it will suffice to say, that as the third section of the act *ex industria*, prohibits preferences and discriminations "in any respect whatsoever," it appears to the court that the proposition above stated is not tenable, unless it be a fact that no adjustment of joint through rates with respect to other rates over the lines of the connecting carriers, can operate as an undue preference, or as an unreasonable discrimination against persons and places.

If joint through rates may be, and are so adjusted with reference to other rates established by the connecting carriers, as to operate as a preference or discrimination against persons and places and such adjustment is unreasonable—that is to say, is not justified by the circumstances of the case,—a carrier concerned in making such joint rate, by receiving the portion of the same allotted to him, may be guilty of a violation of the third section.

The decision of the Interstate Commerce Commission in the case of the Chamber of Commerce of Milwaukee vs. F. & P. M. R. R. Co. (2nd Interstate Commerce Commission Reports 570 & 571) proceeded clearly on the assumption that the rates charged from Milwaukee to the seaboard by the roads east of Milwaukee, on shipments originating at Milwaukee, might be a discrimination against shippers residing in the latter city and a violation of the 3rd section, by reason of the disparity between that rate, and the percentage of the joint through rate from Minneapolis to the seaboard, which those roads accepted for the haul east of Milwaukee. It is true that in that case no discrimination was found to exist as a matter of fact, the commission holding that the difference of two and one-half cents per hundred, was not under the circumstances unreasonable.

It seems evident to the court that it is within the power of the Missouri Pacific Railway Company and other carriers, to unite with roads east of the Mississippi River in establishing joint rates from Chicago to points in Kansas, Arkansas, Nebraska the Indian Territory and Texas, which by virtue of their unfair relation to the rates established from St. Louis, Hannibal and other places to such points in the west and southwest, on shipments originating at St. Louis and Hannibal, would operate as an unreasonable discrimination against the latter cities, and as a serious impediment to their trade and commerce.

I would not be understood by what is last said, as intimating that in the opinion of the court such unfair joint rates have been already made, or that the testimony in this case establishes such fact. On that point I express no opinion.

I mention the matter merely in illustration of the point, that carriers clearly have it in their power to so adjust joint rates with respect to other rates, as to operate both as an unreasonable preference given to persons and places, and as an undue discrimination against persons and places. Such greviences if they in fact existed, could not be redressed under the second section of the act, because the services would not be rendered under "substantially similar circumstances and conditions," and there might be no redress under the fourth section of the act, because the long and short haul clause would not necessarily be violated.

If that kind of preference and discrimination are not in violation of the third section, then such acts cannot be punished in a criminal proceeding.

NOTES OF RECENT DECISIONS.

THE right to lay railroad tracks in a street was considered by the Supreme Court of Mississippi in Theobald v. Louisville, N. O. & T. Ry. Co. There it was held, that a steam railroad cannot be constructed and operated on a street, except with the consent of the abutting land-owners, or by the right of emi-

nent domain, and it is immaterial whether or not the fee of the street is in the abutting owners. The court says:

It is obvious that the right of the adjacent owner to the free use of the street on which his property is located imparts value to the property, and that to deny or restrict his use of the street, by unusual, dangerous, and permanent obstructions and appliances placed in the street, would seriously affect the value and enjoyment of his property. While the general public might be benefited by the existence of such obstructions and appliances, the adjoining owner might be greatly damaged, if not ruined, by them, if the law afforded him no remedy. Of such disadvantages, if any, as may result from the use of the street by the public in the manner in which public streets are ordinarily used, he could not complain; but it seems clear that the construction and operation of a railroad in the street in front of his property, without his consent, and without his being compensated, would be an invasion of his legal rights. This conclusion follows inevitably, unless railroads are among the objects for which public streets are originally designed. Can railroads be said to be among such objects.

A street is a public thoroughfare or highway, established for the accommodation of the public generally, in passing from place to place, and for such other incidental uses as are ordinarily made of public streets,—such as laying drains, sewers, gas and water pipes, and the like. Public streets are for the use and benefit of all, and no one has any exclusive rights and privileges therein. They are free to all upon like conditions, and subject to use by any means of locomotion which is not destructive of the common uses and ordinary methods of travel. If this is true, a railroad does not fall within the purposes for which public streets were originally established, and the occupation of a public street by a railroad is an additional servitude on the land, and a perversion of the street from its original purposes. The introduction of a new motive power would not, perhaps, be material; but a railroad requires a permanent structure in the street, the use of which is private and exclusive. It confers upon an individual or corporation rights and privileges in the street which are incompatible with those of the public and of adjacent proprietors. To hold that a railroad is one of the legitimate uses of a public street leads to the inconsistency that the street may be monopolized by a corporation or an individual, and filled with parallel tracks which would practically exclude all ordinary travel, and still be said to be devoted to the ordinary uses of a public street. Lewis, Em. Dom. § 111; 1 Hare, Const. Law, 362; Cooley, Const. Lim. 678. * * *

The laying out of a public street creates two co-existent rights,—one belonging to the puplic, to use and improve the street for the ordinary purposes of a street; the other, to the abutting owner, to have access to and from his property over the street, and to make such use of the street as is customary and reasonable. Both are valuable, and the one as inviolable as the other. It would be as unjust and unwarranted for the public to use and appropriate the street, so as to impair or distroy the rights of the abutting owner, without his consent, and without compensation, as it would be for him, by a like course of conduct, to impair or destroy the rights of the public. So that it appears that the abutting owner has special interest and rights in the public street, which are valuable and indispensable to the proper and beneficial enjoyment of his property. His right to use the street as a street is as much property as the street itself, and neither the public nor a corporation, nor an individual, can lawfully deprive him of it, against his will, without compensation. * * *

The weight of judicial authority undoubtedly is that where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, under the constitutional guaranty of private prperty, a steam railroad cannot be lawfully constructed and operated thereon, against his will, and without compensation. Lewis, Em. Dom. §§ 113, 115; 1 Hare, Const. Law, 362; Mills Em. Dom. (2d Ed.) § 204; 2 Dill. Mun. Corp. (3d Ed.) § 725.

A distinction is made by some of the authorities, in cases where the fee in the soil of the street is in the public, the State, county, or city, and where it remains in the abutting owner; and in the first case the right of the abutting owner to compensation is denied, and in the latter it is recognized and allowed. We perceive no well-founded difference in principle in such distinction. If the fee is in the public, it is held in trust, expressly or impliedly, that the land shall be used as a street, and it cannot be applied to any other purpose without a breach of trust. It is only where the fee is in the public, free from any trust or duty, that it may be disposed of for any purpose that the public may deem proper. Whether the abutting owner has simply an easement in the street, while the fee is in the public or in some other owner, or whether he has both the fee and an easement, he is equally entitled to require that nothing shall be done in derogation of his rights. 1 Hare, Const. Law, 370, 375; Lewis, Em Dom. §§ 114, 115; Barney v. Keokuk, 94 U. S. 324; Railroad Co. v. Schurmeir, 7 Wall. 272; Story v. Railroad Co., 90 N. Y. 123; 1 Ror. R. R. 524; Haynes v. Thomas, 7 Ind. 38; Anderson v. Turbeville, 6 Cold. 150; Railroad Co. v. Steiner, 44 Ga. 546; Crawford v. Village of Delaware, 7 Ohio St. 459.

Two recent negligence cases have turned on injuries sustained by being pushed off the sidewalk. In one—McIntire v. Roberts, decided by the Supreme Court of Massachusetts—the victim of the casualty was pushed into an elevator shaft on defendant's premises, which opened upon the sidewalk, and was for the time being in use and unguarded by any barrier. In the other—Village of Carterville v. Cook, decided by the Supreme Court of Illinois—he was thrown off the sidewalk at a point where it was some feet higher than the street, and not protected by any railing; and the action was against the village, on the theory that they were in fault for not guarding it. The first mentioned action was not sustained, the other was.

In the first case—McIntire v. Roberts—the court, in an opinion by Judge Field, after conceding that if one maintains a dangerous private way on his own premises, he may be liable, says:

We are not aware that it has ever been decided here

that excavations made by the owner of land outside the limits of a highway, but so near as to make it unsafe for travelers, constitute a public nuisance, for creating or maintaining which the landowner may be punished, or that in assessing damages for land taken for a highway any allowance is made to the landowner for the loss of any right to use the land not taken, in the same manner as if a highway had not been laid out. But if it be assumed that, when a building abuts upon a street, it is for the authorities of the city or town to determine whether the entrances into the building from the street are so constructed that they may be permitted to remain, and if it be also assumed that when entrances are permitted, which are constructed so as to be closed when not in use by doors or some other barrier, the occupier of the building is liable in damages to travelers upon the street, if the doors are negligently left open or the barrier left down, whereby the street becomes unsafe and the travelers are injured, yet we are of opinion that the facts stated in the report do not show, or tend to show, negligence on the part of the defendant. It does not appear that the opening was not constructed so as to be closed with doors, or a proper barrier, when the elevator was not in use. The stone lintel was about three inches above the sidewalk. The opening was but five or six feet wide, and necessarily nearly at a right angle with the line of the sidewalk, and the width of the wall of the building was about eighteen inches. It was impossible that any traveler using due care in the daytime should mistake the opening for a continuation in the sidewalk. The only danger was that a person on the sidewalk might be pushed into the opening as he might be pushed against the wall of the building, or against or through a window, or against a door. The elevator, at the time of the accident, was in use for carrying up the iron castings which were being unloaded from the wagon which had been backed up against the curbstone of the sidewalk. The accident that happened was one that could not reasonably have been anticipated, unless the horse was vicious, or there was negligence in managing him; and it does not appear that the horse belonged to the defendants, or that the persons who were unloading the castings, or were in control of the horse, were servants of the defendants.

In the other case—Village of Carterville v. Cook—Schofield, J., after adverting to the Massachusetts rule that, under the statute of that State, the concurring negligence of a third person may exonerate, said:

We are committed to a different line of ruling upon this question. In Joliet v. Verley, 35 Ill., 58; Bloomington v. Bay, 42 Ill., 503; City of Lacon v. Page, 48 Ill., 500—we held that if a person, while observing due care for his personal safety, be injured by the combined result of an accident and the negligence of a city or village, and the injury would not have been sustained but for such negligence, yet, although the accident be the primary cause of the injury, if it was one which common prudence and sagacity could not have foreseen and provided against, the negligent city or village will be liable for the injury.

It is not perceived how, upon principle, the intervention of the negligent act of a third person, over whom neither the plaintiff nor the defendant has any control, can be different in its effect or consequence in such case from the intervention therein of an accident having a like effect. The former no more than the latter breaks the casual connection of [the negligence of the city or village with the injury. The injured party can no more anticipate and guard against the one than the other, and the elements which constitute the negligence of the city or village must be precisely the same in each case; and we have accordingly held that when a party is injured by the concurring negligence of two different parties, each and both are liable, and they may be sued jointly or separately (Railway Co. v. Shacklet, 105 Ill., 364; Transit Co. v. Shacklet, 119 Ill., 232, 10 N. E. Rep. 896). And this is abundantly sustained by decided cases elsewhere (Railroad Co. v. Mahoney, 57 Pa. St., 187; Railroad Co. v. Terry, 8 Ohio St., 570; Smith v. Railroad Co., 46 N. J. Law, 7; Webster v. Railroad Co., 38 N. Y., 260; Patt. R'y Accident Law, §§ 89, 95, and cases cited in notes appended to each section. See, also, Shear. & R. Neg., 2d ed., §§ 10, 27, 46, 401). And we have applied the same rule in a suit for negligence against a municipal corporation: Peoria v. Simpson, 110 Ill., 301. The Massachusetts rule seems to be applied, also, in Maine: Moulton v. Sanford, 51 Me., 127; Wellcome v. Leeds, *Id.* 313. But it seems to be elsewhere repudiated, when the question has been considered. See Hunt v. Pownal, 9 Vt. 411.

THAT a vicious man should not be kept upon one's premises any more than a vicious or savage dog, or other animal, is learned from the decision of the Minnesota Supreme Court in Dean v. St. Paul Union Depot Company. There it appears that the defendant corporation is organized for the express purpose of furnishing depot and station-house accommodations at the City of St. Paul for the use of such railway corporations as enter into contract with it; that it leases a room in its depot building to a tenant, who therein carries on the business of storing for hire the parcels and light baggage of travelers; that plaintiff arrived at said depot by rail, and as a passenger, and proceeded to said room for the purpose of temporarily storing his valise, and was there willfully and maliciously assulted, and beaten by an employee of defendant's tenant. It is further charged that this employee was a man of savage and vicious propensities, who had frequently, during the six years of his employment there, attacked and beaten persons lawfully upon the premises, and that all of this was well known to the defendant corporation on the day of the attack upon the plaintiff. It was held that the complaint states a good cause of action. The court says:

In support of its demurrer the defendant corporation contends—*First*, that it owed no duty whatever to the plaintiff, because no contractual relation existed between the parties; that therefore he must look to the railway company whose passenger he was, or had been, for compensation for his injuries; *second*, if it should be held that the duties imposed by railway companies towards their arriving and departing pas-

sengers have been assumed by the defendant, it is not responsible in this case, because the alleged assault was not committed by one of its servants or employees, but by the employee of a tenant who was engaged in an independent business, wholly disconnected from that of a common carrier of passengers, and conducted solely for the accommodation and convenience of those who chose to patronize the room, and pay for the privilege of having their parcels temporarily taken care of; *finally*, if these positions prove untenable, it is argued that the assault of the employee was for purposes of his own, outside of his occupation, in disregard of the object for which he was employed, not committed in execution of it, and therefore in no event can the defendant be held responsible.

It has been announced by this court in Ahlbeck v. R. R. Co., 40 N. W. Rep. 364, that in respect to the handling and care of baggage the relation between the defendant and the carriers who use its depot is that of principal and agent; but under the allegations of the complaint now before us it is not essential to determine the precise relations existing between the defendant (organized for the especial purpose and under contract to furnish to certain railway corporations proper and adequate depot and station-house accommodations for those who are entitled to use the same), and the plaintiff who, arriving upon the train of one of these carriers, remained its passenger until he had an opportunity, by safe and convenient means to leave the cars, the railway, and the station-house. Warren v. Railway Co., 8 Allen, 227. Nor is it necessary to pass upon the contention of the defendant that, whatever duty it owed the plaintiff as a passenger, it cannot be held liable for the willful act of the servant and employee of one who had leased a room in its depot building for the purpose of carrying on an independent business, not required of the carrier of passengers, and conducted by a tenant solely for the convenience of the traveling public. Nor, as we regard the pleading, need we consider the final position assumed by defendant, that the master is not responsible for the willful acts of his servants, performed outside of his employment, not in execution of it, and for purposes of his own, although the subject has been referred to. McCord v. Telegraph Co., 39 N. W, Rep. 315, in which is mentioned, approvingly, the case of Stewart v Railway Co., 90 N. Y. 588. whereby Isaacs v. Railway Co., 47 N. Y. 122, relied upon by the respondent, was, in effect, overruled.

This complaint, considered in connection with the stipulation, charges that the defendant knowingly and advisedly permitted its tenant to keep in his employ for more than six years, in its depot building, into which it encouraged people to come, and was under contract to admit the plaintiff as an arriving passenger, a man of savage and vicious propensities, and who had, during said period of six years, frequently assaulted and beaten persons lawfully upon said premises, and who, upon the day named, attacked and beat the plaintiff without provocation. Whatever obligation otherwise, by virtue of its contract with the carrier rested upon the defendant as to the plaintiff, it is manifest that it was bound to use ordinary care and diligence to keep its premises in a safe condition for those who legitimately came there. It had no more right, therefore, to knowingly and advisedly employ, or allow to be employed, in its depot building, a dangerous and vicious man, than it would have to keep and harbor a dangerous and savage dog or other animal, or to permit a pitfall or trap into which a passenger might step as he was passing to or from his train.

The question, sometimes a very difficult one, as to the effect of an intention to commit a crime, which may or may not be carried out, was considered by the Supreme Court of Virginia in Hicks v. Commonwealth. In that case an indictment charged defendant with attempting to poison with intent to kill one A. by buying the poison and delivering it to one L, and soliciting her to administer it in coffee to A. but which failed to allege that L consented to do so, or that anything else was done. It was held that such an indictment does not charge an offense under the Code of Virginia, 1887, Section 3669, declaring it a falony to attempt to administer poison in food, drink, &c., with intent to kill. The court said:

An attempt to commit a crime is compounded of two elements: (1) The intent to commit it; and (2) a direct, ineffectual act done toward its commission (Code, § 3888; 2 Bish. Crim. Proc. § 71), or, as Wharton definies it, "An attempt is an intended, apparent, unfinished crime." Therefore the act must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement toward the commission of the offense after the preparations are made. Uhl's Case, 6 Grat., 706; McDady v. People, 29 Mich., 50; Bouv. Law Dict., "Attempt."

Thus it has been often held, under statutes similar to our own, that the purchase of a gun with intent to commit murder, or the purchase of poison with the same intent, does not constitute an indictable offense, because the act done in either case is considered as only in the nature of a preliminary preparation, and as not advancing the conduct of the accused beyond the sphere of mere intent. "To make the act an indictable attempt," says Wharton, "it must be a cause, as distinguished from a condition; and it must go so far that it would result in the crime, unless frustrated by extraneous circumstances." 1 Whart. Crim. Law, § 181. This is well illustrated by the case of People v. Murray, 14 Cal., 159. In that case the defendant was indicted for an attempt to contract an incestuous marriage with his niece. It was shown that, after declaring his intention to marry her, he actually eloped with her, and sent for a magistrate to perform the ceremony, and at the trial he was convicted. But on appeal the judgment was reversed, the appellate court holding that these were mere preparations, and did not constitute an attempt, within the meaning of the statute. In delivering the unanimous opinion of the court, Field, C. J., said: "The evidence shows very clearly the intention of the defendant; but something more than the mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself there is a wide difference. The perpetration consists in devising or arranging the

means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made. To illustrate: A party may purchase and load a gun, with the declared intention to shoot his neighbor; but, until some movement is made to use the weapon, upon the person of his intended victim, there is only preparation, and not an attempt. For the preparation he may be held to keep the peace, but he is not chargeable with any intent to kill. So, in the present case, the declarations and elopement and request for a magistrate were preparatory to the marriage; but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said in strictness, [*i. e.*, in a legal sense,] that the attempt was made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party."

The same principle was recognized by the Supreme Court of Pennsylvania in a recent case, and one which bears a striking resemblance to the case before us. There the defendant was indicted and convicted for an attempt to administer poison, under a statute the provisions of which are substantially the same as those of our own statute. It was proved at the trial that the defendant, in a conversation with the witness Neyer, stated his grievance against his intended victim, Waring, and his determination to be revenged, and then solicited Neyer to put poison in Waring's spring, so that he and his family would be poisoned, offering him a reward therefor. He also gave him directions how to administer the poison, and gave him the poison to be administered, But the witness refused to have anything to do with it, and handed it back to the defendant, and testified that he never intended to administer it. Upon these facts the supreme court held that all that occurred at the interview with the witness, and the legal inferences deducible therefrom, followed by no other act, were not sufficient to warrant a conviction for an attempt to commit the felony charged; that the act proved did not approximate sufficiently near to the commission of murder to establish an attempt to commit it, within the meaning of the statute: and the judgment was accordingly reversed. "Merely soliciting one to do an act," said the court, "is not an attempt to do that act. * * * 'In a high, moral sense, it may be true that solicitation is attempt; but in a legal sense it is not.'" Stabler v. Com., 95 Pa. St. 318. The court in its opinion also referred to the case of Reg. v. Williams, 1 Car. & K. 589, 1 Denison, Cr. Cas. 39, which was a prosecution under the third section of the act of 1 Vict., from which the Pennsylvania statute was substantially copied, and in that case it was held that the delivery of poison to an agent, with directions to him to cause it to be administered to another, was not sufficient to establish an attempt to murder. In that case the agent was actually given money for his services, and immediately proceeded with the poison to the house of the intended victims, but upon his arrival there he gave up the poison to them, and told them all about it. The prisoners were convicted, but at the ensuing term the case was considered by the fifteen judges, who held the conviction wrong.

The application of these principles to the facts of the present case shows very clearly, we think, that the judgment is erroneous. Here, undoubtedly, there was an intent to commit murder, but the acts done do not amount to anything more than the mere arrangement of the proposed measures for its commission. They were nothing more than mere preparations, and even the intended preparations were not completed before the criminal design was frustrated.

An interesting question of banking and as to the acceptance of checks, came before the United States Circuit Court, West Dist. of Mo., in case of Garretson v. North Atchison Bank. There a cattle company had agreed to sell to one T certain cattle for $22,000. T offered in payment his check on defendant bank. The vendor refused to accept it unless plaintiffs, to whom vendor was indebted, would accept it in payment of the debt. The payee in the check telegraphed to defendant asking if it would pay T's check for $22,000. and defendant telegraphed: "T is good. Send on your paper." The telegram was shown to plaintiffs, who took the check in payment of their debt. It was held that the answer was an acceptance of the check for the sum named in the first telegram, and was sufficient, under Rev. St. Mo. § 533, providing that an acceptance of a bill of exchange must be in writing, and § 534, providing that an acceptance on a separate paper will bind the acceptor in favor of one to whom it has been shown who takes the bill on the faith thereof for a valuable consideration, to render defendant liable to plaintiffs on the check. Phillip, J., says:

A brief recurrence to some general principles applicable to bank checks may not be impertinent, as a due regard to these will materially aid in a proper conclusion. Many text writers liken such checks, in their substance, to inland bills of exchange, payable on demand. 1 Rand. Com. Paper, § 8; Byles, Bills, 13 1 Edw. Bills, § 19. Mr. Justice Swayne, in Bank v. Bank, 10 Wall. 647, very aptly notes the essential difference between checks and bills of exchange:

"Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law-merchant are alike applicable to both. Each is for a specific sum, payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance no action can be maintained by the holder upon either against the drawer. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A

check in such case would be a fraud. * * * By the law-merchant of this country the certificate of the bank that a check is good is equivalent to acceptance."

It would therefore follow that when a check has been certified, which is but the equivalent of acceptance, by the drawee, it stands, in its commercial relation, as an accepted bill of exchange. From its acceptance the implication arises that it is drawn upon sufficient funds of the drawer in the hands of the drawee, and that such fund is set apart, appropriated, for the check whenever presented. It is not only an admission that the drawer then has in the hands of the drawee the required fund, but it imposes the obligation on the drawee to reserve and hold the fund for the redemption of the check when presented. Bank v. Bank, *supra*. Nor is it material, as between a *bona fide* transferee of the check and the drawee, that the drawee in fact had no money in the bank at the time of the acceptance. The certification operates, in such case, an effectual estoppel against such defense. Cook v. Bank, 52 N. Y. 96; Bank v. Bank, *supra;* Jarvis v. Wilson, 46 Conn. 90-92; 2 Daniell, Neg. Inst. § 1603. Such accepted check, possessing the quality of commercial paper, passes by indorsement, and confers upon the indorsee the right of action as upon any other chose in action. Freund v. Bank, 76 N. Y. 355, 356; Bank v. Richards, 109 Mass. 413; Whilden v. Bank, 64 Ala. 29, 30.

It only remains, therefore, to be determined whether or not the defendant bank did accept the payment of the check in question, and, if it did accept, what are the rights of these plaintiffs? The check being drawn on a Missouri bank, to be paid here, the State statute regulating the matter of acceptances of such paper applies. The statute recognizes, what had already become the established common-law rule, that the acceptance may be written on a paper other than the bill, and of consequence, it may be made by letter, and, if by letter, also by telegram. Bank v. Bank, 1 N. Y. Leg. Obs. 26; Espy v. Bank, 18 Wall. 604; Whilden v. Bank, 64 Ala. 32, 33. "The statute requires the promise to be in writing, but is silent as to the mode of communicating it to the party cashing the draft upon the faith of it. When it is in writing and thus acted upon, its mode of conveyance, whether by telegraph, mail or otherwise, affects no rights, and such effect must be given to it as manifest justice, and the exigencies of commerce call for in this class of communications." Bank v. Howard, 40 N. Y. Super. Ct. 20. * * * In Coolidge v. Payson, 2 Wheat. 66, Chief Justice Marshall states the rule that "a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." While in the subsequent case of Boyce v. Edwards, 4 Pet. 111, the ruling in Coolidge v. Payson, was reviewed, the rule as stated by Chief Justice Marshall was not disturbed where the letter of acceptance applies directly to a particular bill drawn or to be drawn. By § 535, Rev. St. Mo., it is provided that "an unconditional promise in writing to accept a bill before it is drawn shall be deemed an actual acceptance in favor of every person to whom such written promise shall have been shown, and who upon the faith thereof shall have received the bill for a valuable consideration." It would be difficult to perceive, on principle, what difference there could be in a promise to accept before drawing and the facts as disclosed in the petition. The defendant, in the very nature of such commercial transactions, must have understood that the purpose of the inquiry made of it was to have the payment of the check assured if taken by the party sending the telegram. The answer was shown to the plaintiffs, and in reliance upon the assurance it contained, the plaintiffs accepted the check. As well settled in this jurisdiction, the application of the check by the plaintiffs to the indebtedness to them from the cattle company was for a valuable consideration, and constitutes them *bona fide* holders of the check, and as such the right of action thereon inures to them regardless of any equities between the original parties. Railroad Co. v. Bank, 102 U. S. 14-22; Pope v. Bank, 59 Barb. 226; Bank v. Howard, *supra;* Whilden v. Bank, 64 Ala. 1-30; Freund v. Bank, 76 N. Y. 353-358; Johnson v. Clark, 39 N. Y. 216; Coolidge v. Payson, 2 Wheat. 66.

UNDER what circumstances, the extension of a cemetery may be enjoined as a nuisance was considered by the Supreme Court of Texas, in Dunn v. City of Austin. There it was held that a petition for injunction against the use of ground as a cemetery is insufficient where it makes no allegation as to the altitude, respectively of the proposed cemetary and the land of plaintiffs, and where it describes the latter as being in the "neighborhood" of the cemetery, and as "almost surrounding it," without describing more definitely its distance therefrom, that a cemetery is not a nuisance *per se*, and to enjoin its use such facts must be set forth as will show with reasonable certainty that a nuisance will be brought into existence by the acts of defendants, and that plaintiffs will suffer injury thereby unless an injunction is granted. The fact that the proximity of the cemetery may render property in the neighborhood less valuable is no ground for enjoining such use, where no nuisance is created thereby. The court says:

Relief is sought against a threatened injury, and there is no doubt of the power of a court of equity to grant such relief when it is made clearly to appear that without it irreparable injury will result. "When the matter complained of is not in itself a nuisance, when it is not in its very nature hurtful to others, when it does not of necessity threaten to impair materially the health and comfort of those who may live near it, and the fact that it is a nuisance has not been established at law, the court abstains from interference, unless a case of pressing necessity is shown by the bill, and by the proofs." Rosser v. Randolph, 7 Port. (Ala.) 238. Nor will the court interfere when the thing complained of is not in existance, but may be called into existance, by threatened acts of the defendant, in the exercise of his lawful dominion over his property, and it is uncertain, dependant upon circumstances in the future, whether it will or not operate injuriously. St. James Church v. Arrington, 36 Ala. 546; Kingsbury v. Flowers, 65 Ala. 484; Ellison v. Commissioners, 5 Jones, Eq. 58; Lake View v. Letz,

44 Ill. 82; Musgrove v. Catholic Church, 10 La. Ann. 431; Lake View v. Cemetery Co., 70 Ill. 192; Begein v. City, 28 Ind. 81; Adams v. Michael, 38 Md. 123; High, Inj. § 742; Wood, Nuis. §§ 796, 797. That a cemetery is not a nuisance *per se* would seem to be a self-evident proposition, and is well settled by the authority of many adjudicated cases, There is no doubt, however, that from its locality or manner of use it may become a nuisance. The inquiry in this case is, does the petition allege the existence of such facts as show with reasonable certainty that a nuisence will be brought into existence, and that the petitioners and those whom they assume to represent will suffer injury thereby unless relief prayed for is granted. The rules applicable to the pleadings in this class of cases have been frequently considered and stated. In Kingsbury v. Flowers, it was said: "Facts and circumstances should have been stated distinctly from which the court could see plainly that if future interments on these grounds are not prevented there would be a diminution of the complainant's enjoyment of his dwelling, and at least probable injury to the health of his family. It is not enough to allege simply that such consequences will result. There must be such a clear, precise statement of facts that there can be no reasonable doubt, if the acts threatened are completed grevious injury will result. * * * Without the averment of special circumstances from which the court can be satisfied that future burials on these grounds will most probably result in a nuisance from which the complainant will suffer special injury irreparable by ordinary remedies at law, there should not be interference to restrain them." The same court, in speaking upon the same subject, in the case of Rouse v. Martin, 75 Ala. 514, said: "A very strong case must therefore be made by the bill, and if there is any reasonable doubt as to the probable effect of an alleged nuisance, either on the proof, affidavits, or on the construction of the facts stated in the bill, there will be no interference until the matter is tested by experiment in the actual use of the property. * * * In determining the question of interference the court will look at the facts which are stated in the bill, giving little or no weight to the mere opinion of the complainant that they will constitute a nuisance unless such a conclusion clearly follows by proper inference from these facts." In Adams v. Micheal, 38 Md. 123, where an injunction was asked against threatened nuisance, the court said: "It is not enough for the parties complaining simply to allege that particular consequences will follow the erection of the factory. That may be their opinion or apprehension, but facts must be stated so that the court can see and determine whether the allegation is well founded. There is no allegation in the bill before us as to the precise proximity of the intended factory to the buildings of complainants, nor are there any allegations as to the extent of the factory, what combustable materials are to be used therein, or the quantity of smoke and vapor likely to be emitted therefrom." The same rule has been announced in many other cases. Thebaut v. Canova. 11 Fla. 167, and cases cited by elementary writers referred to. In the notes to the case of Ryan v. Copes, 73 Amer. Dec. 106, cases are very fully cited bearing on the general questions involved in this case.

PUBLIC POLICY IN THE LAW OF CONTRACTS.

There is no principle of law better settled, more frequently applied and more preservative of the integrity of the law and the good order and best interests of society than that embodied in the maxium, *ex turpi causa non oritur actio*.[1]

The law will not aid a man who founds his action on an act contrary to morality or public policy. It becomes, therefore, of the highest importance to understand what this public policy is to which all contracts must conform to be valid, its extent and limits, and the guiding principles by which it is determined.

Definition.—It is difficult to give a precise definition of public policy. It is much easier to perceive the existence and sources of it, than to mark its boundaries or prescribe the limits to its exercise.[2]

It has been defined by Blackstone as "the due regulation and domestic order of the kingdom, whereby individuals of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners."[3] In its broadest sense, it includes the entire system of laws, written and unwritten, which is adopted and pursued as best adapted to the interests of society. It has been used interchangeably with "political expediency," "the public good," and "good of the State."[4] It is synonymous, therefore, with "the public welfare," and the public welfare requires that the public health, justice, morals, trade and peace be kept inviolate. Whatever is injurious to these great interests, which society cherishes and laws are formed to promote, is contrary to public policy and void.

Enumeration of Contracts against Public Policy.—A more particular enumeration of contracts against public policy would include contracts in total restraint of trade, or marriage, against the prohibition of statutes, to

[1] Morck v. Abel, 3 B. & P. 35; Armstrong v. Toler, 11 Wheat. 258; Stanton v. Allen, 5 Denio, 435; Holman v. Johnson, Cowper, 341.

[2] Commonwealth v. Alger, 7 Cushing, 84; Story on Contracts.

[3] 2 Blackstone Com. *163.

[4] Egerton v. Brownlow, 4 H. L. Cas. 1-250.

infringe a copyright, to defraud the government or third parties, to oppress third parties, or prevent the due course of justice, or induce a violation of public duty, that tend to encourage immoral or unlawful acts, trading with an enemy, all detrimental to the public order and public good, in such manner and degree as the decisions of courts have defined.[5]

How Determined.—Whether a contract is included within one of these classes, or is against public policy, is a question of law for the court to determine from all the circumstances of each case, acting with due caution, following as closely as possible the analogy of well-decided cases and the principles enunciated in them.[6] Besides the judicial decisions, courts may also ascertain the public policy of a State from its constitution and statutes;[7] so that what the public policy of a State at any time is, can be determined from its constitution, statutes and judicial decisions. The decisions cover a wide variety of cases, but several principles common to all may be derived from them. These are:

First. The validity of the contract is to be determined by its general tendency at the time it was made.[8] If this is opposed to the public welfare the contract will be invalid, even though the intent of the parties to the contract be good and no actual injury resulted to the public in the particular case.[9] Thus, an agreement for a pecuniary consideration made by a railroad company for the location of a depot is void, though the location may be advantageous to the public.[10] Under this principle fall all agreements to control the business operations of the government, appointments to offices and ordinary course of legislation;[11] also contracts whose evident purpose and tendency is to establish a monopoly, but which in fact do not destroy competition or advance prices.[12] The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of its courts.[13]

Secondly. A contract will be invalid as against public policy if improper means are employed in its execution. For example, an agreement to compensate a private citizen for his efforts to secure the location of a government building at a certain place will be enforced, unless improper means are used to obtain it, and in such a case, in the absence of contrary evidence, it will be presumed that only lawful methods were employed.[14]

Thirdly. A contract will be void if its object is prejudicial to the public. Thus, an agreement between several persons to refrain from bidding at a public sale, in order to restrict competition of bidders, is invalid, but if the object of the contract is to have one bid for all as partners, it will be enforced.[15] A somewhat extended application of this principle was made recently by the Supreme Court of Kansas, which pronounced void as against public policy an agreement between certain attorneys and other parties, whereby the former agreed to defend the latter in all suits which might be brought against them for violation of the prohibitory liquor laws.[16]

Fourth. A contract is not void as being against public policy, unless it is clearly and palpably injurious to the public. The burden of proof is upon the one who asserts that a contract is opposed to public policy.[17]

[5] Gibbs v. Gas Co., 28 Cent. L. J. 534, and cases cited; Koehler v. Feuerbacher, 2 Mo. App. 11.

[6] Egerton v. Brownlow, 4 H. L. Cas. 1-230; Pierce v. Randolph, 12 Tex. 290.

[7] Swan v. Swan, 21 Fed. Rep. 301; Vidal v. Girard, 2 How. (U. S.) 127.

[8] Fuller v. Dame, 18 Pick, 472; Richardson v. Crandall, 48 N. Y. 348; Holliday v. Patterson, 5 Oreg. 177; 2 Cent. L. J. 63; Williamson v. Chicago, etc. R. Co., 10 Cent. L. J. 298; Woodstock Iron Co. v. Richmond, etc. Co., 28 Cent. L. J. 454, and cases cited; Crawford v. Wicks, 18 Ohio St. 190; Meguire v. Corwine, 101 U. S. 108; Tool Co. v. Norris, 2 Wall. 45; Marshall v. B. & O. R. Co., 16 How. 314; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Oscanyan v. Arms Co., 103 U. S. 261; Schofield v. L. S., etc. R. Co., 1 West. Rep. 812; Railroad Co. v. Seeley, 45 Mo. 212.

[9] Cases *supra*.

[10] Fuller v. Dame, 18 Pick. 472.

[11] Tool Co. v. Norris, 2 Wall. 45.

[12] Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666.

[13] Tool Co. v. Norris, 2 Wall. 45.

[14] Beal v. Polhemus (Mich.), 34 N. W. Rep. 532.

[15] Hopkins v. Ensign, 53 N. Y. 676; Breslin v. Brown, 24 Ohio St. 565; 2 Cent. L. J. 253; Wicker v. Hoppock, 6 Wall. 97; Phippen v. Stickney, 3 Metcalf, 384; Bame v. Drew, 4 Denio, 290; Garrett v. Moss, 20 Ill. 549.

[16] Bowman v. Phillips, 28 Cent. L. J. 482, and note.

[17] Richardson v. Mellish, 2 Bing. 229; Boardman v. Thompson, 25 Iowa, 485; Kellogg v. Larkin, 3 Pinney (Wis.) 123; Richmond v. Dubuque R. Co., 26 Iowa, 191; Swan v. Swan, 21 Fed. Rep. 299. In Printing Co. v. Sampson, L. R. Eq. 462, Sir Geo. Jessel, M. R., in his opinion, says: "If there is one thing more than any other which public policy requires it is that men

He must show that the public will be injured by the enforcement of the contract. Care should be taken to distinguish between public and private policy. This distinction is shown in the case of compounding a felony, which is against public policy,[18] and agreements to settle civil suits,[19] and those criminal in form only, the injury complained of being of a private nature, which are valid.[20]

Courts should refrain from the exercise of their equitable power in interfering with contracts of individuals, unless in some tangible form they threaten the welfare of the public.[21] Thus, an agreement by the quarrymen of a certain portion of a city to form an association to secure the sale of the produce of their quarries at "uniform prices and living rates'[7] was enforced, it being considered not manifestly injurious to the public;[22] and a contract between the manufacturers of a certain fixture to sell at a uniform price, which was to be changed only by the consent of a majority of them, is not necessarily prejudicial to the public, and is valid.[23]

In a recent New York case,[24] it was held that an agreement not to engage in a particular business within any of the States or Territories of the United States, excepting Nevada and Montana, was valid, since there is little danger now that the public will suffer harm from lack of persons to engage in a profitable industry." [24]

Different in Different States.—Since the habits, opinions and wants of people of different States are not the same, they require different laws and a different public policy. What is the interest of one State may be the destruction of another. This is frequently illustrated when the courts of one State are called upon to enforce a contract made in another. The rule in such cases is that a contract valid where made will be enforced by the courts of any other State, unless it is contrary to the settled public policy of the latter.[25] The policy of the States in regard to champertous contracts,[26] usurious contracts,[27] the liquor traffic, Sunday observance,[28] wagers and lotteries [29] differs.

DAVID PLESSNER.

of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice."

[18] Henderson v. Palmer, 75 Ill. 579; Shaw v. Reed, 30 Me. 105; Commonwealth v. Pease, 16 Mass. 91; Cheltenham Co. v. Cook, 44 Mo. 89; McCoy v. Green, 83 Mo. 626.

[19] Muirhead v. Kirkpatrick, 21 Pa. St. 237; Wyatt v. Evans, 52 Ala. 285; Stewart v. Ahrenfelt, 4 Denio, 189; Heaps v. Dunham, 95 Ill. 583.

[20] Breathwit v. Rogers, 32 Ark. 78; Soule v. Bonney, 37 Me. 128; Davis v. Moody, 15 Ga. 175; Holt v. Cooper, 41 N. H. 111.

[21] Leslie v. Lorillard, 1 L. A. R. (N. Y.) 460.

[22] Skrainka v. Scharringhausen, 8 Mo. App. 527.

[23] Central Shade Roller Co. v. Cushman, 3 New Eng. Rep. 505.

[24] Diamond Match Co. v. Roeber, 106 N. Y. 473.

[25] The strict doctrine which formerly prevailed in regard to contracts in restraint of trade has been relaxed by modern decisions: Rouissillon v. Rouissillon, L. R. Ch. Div. 35; Oregon Nav. Co. v. Winsor, 20 Wall. 74; Leslie v. Lorillard, *supra*.

[26] Story on Confl. Laws, § 244; Rouissillon v. Rouissillon, *supra;* Oscanyan v. Arms Co., 103 U. S. 261; Thatcher v. Norris, 11 N. Y. 137; Evans v. Kittrell, 33 Ala. 449; Ewing v. Toledo Bk., 1 West. Rep. 82; Sav. Bk. Kan. v. Nat. Bk. of Com. 38 Fed. Rep. 800.

[27] Duke v. Harper, 2 Mo. App. 1.

[28] Ewing v. Toledo Bk., 1 West. Rep. 82.

[29] Swan v. Swan, 21 Fed. Rep. 299.

[30] Watson v. Murray, 23 N. J. Eq. 257; Sav. Bk. Kan. v. Nat. Bk. of Com. 38 Fed. Rep. 80.

CONTEMPT—LIBEL OF PRESIDING JUDGE—JUDICIAL NOTICE.

MYERS V. STATE.

Supreme Court of Ohio, May 21, 1889.

1. The furnishing by a correspondent for publication, and procuring to be published in a newspaper, an article containing statements regarding a judge then engaged in the trial of a cause, imputing to him conduct in respect to the case upon trial which, if true, would render him an unfit person to preside at the trial of the cause, with knowledge on the part of the correspondent that such newspaper has a large circulation in the county where the trial is in progress, and with reasonable ground to believe that the same will, when published, be circulated in the court-room and about the court-house during said trial, and there read, and which was afterwards,, during the trial, circulated and read therein, is a contempt of court.

2. Such act comes within the purview of § 5639, Rev. Stat. Ohio, which provides that "a court or judge at chambers may punish summarily a person guilty of misbehavior in the presence or so near the court or judge as to obstruct the administration of justice," and may be punished summarily; and such punishment is within the discretion of the court trying the case.

3. The fact that the presiding judge is the subject of libel in the article which forms the basis of the contempt proceeding does not render him incompetent to try the complaint.

4. Upon such trial it is competent for such judge to take judicial notice of pertinent facts connected with

the transaction which comes within the cognizance of his own senses.

PER CURIAM. The article was a libel upon the presiding judge, but that alone did not form the basis of the information. The intention of the publication was to insult and intimidate the judge, degrade the court, destroy its power and influence, and thus to bring it into contempt; to inflame the prejudices of the people against it; to lead them to believe that the trial then being conducted was a farce and an outrage, which had its foundation in fraud and wrong on the part of the judge and other officers of the court, and, if communicated to the jury, to prejudice their minds, and thus prevent a fair and impartial trial. Besides, the tendancy was, when read by the judge, to produce irritation, and, to a greater or less extent, render him less capable of exercising a clear and impartial judgment. It therefore tended directly to obstruct the administration of justice in reference to the case on trial, and its publication was a contempt of court. The fact that, before its publication, a professional opinion was given that the publication would not be a contempt, does not change the essential character of the defamatory article, nor relieve the respondent of responsibility for its origin and dissemination. Neither was he justified in resorting to such means to right any real or imaginary wrong to himself in respect to the finding of the indictment. A plea in abatement would have searched the record, and caused the indictment to be set aside if found by an illegal body, or procured by improper means. The publication came within section 5639, Rev. St., which reads: "A court, or judge at chambers, may punish summarily a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." It is true that the article was not written, nor was it circulated, by the respondent in the presence of the court. Indeed, it was written in the city of Cincinnati, though dated at Columbus. But the publication was in the court-room, as well as elsewhere. It was intended to have effect, and did have effect, in the court-house at Columbus; and the writer was just as much responsible for that effect as though he had, in the court-room itself, and while the trial was progressing, circulated and read aloud the article, or uttered the libelous words verbally. The acts were thus done, if not in the very presence of the court, at least so near thereto as to obstruct its business. For violation of the foregoing section of the statute the punishment is within the discretion of the court. Section 5645, which provides for the punishment by fine of not more than $500 and imprisonment for not more than 10 days, applies to offenses covered by section 5640, but not to the proceding one above quoted. The discretion here given is a sound, reasonable discretion, and its exercise in a case of this kind is reviewable. It therefore becomes unimportant to consider the question much argued, viz., whether or not the legislature may interfere with the inherent power of courts to punish for contempt; and, as the court had power to try summarily, the form of the complaint is not a material question.

Though the libel was, in a large part, against the presiding judge, that fact did not disqualify him from trying the proceeding in contempt. It was not the libel against the judge which constituted the offense for which the respondent was liable as for a contempt of court. The offense consisted in the tendancy of his acts to prevent a fair trial of the cause then pending in the court. It is this offense which constitutes the contempt, and for which he could be punished summarily; and the fact that in committing this offense he also libled the judge, and may be proceeded against by indictment therefor, is no reason why he may not and should not be punished for the offense against the administration of justice. The statute clearly authorizes, as did the common law, courts to punish summarily, as contempts, acts calculated to obstruct their business. They could not be maintained without such power, nor could litigants obtain a fair consideration of their causes in a court where the jury or the judge should be subject, during the trial, to influences in respect to the case upon trial, calculated to impair their capacity to act impartially between the parties. Nor is there serious danger to the citizen in its exercise. Power must be lodged somewhere; and that it is possible to abuse it is no argument against its proper exercise. But we think the danger more imaginary than real. The judgments of all inferior courts are subject to review. We have an untrammeled press, which, in legitimate ways, may properly exert a powerful influence upon public opinion. All judges are liable to impeachment for any misdemenor in office. Our entire judiciary is elective, and all courts are thus easily within the reach of the people. These checks can, we think, be relied upon to prove an adequate protection to the citizen against any arbitrary or unreasonable use of the discretion thus given to the courts.

In considering and disposing of the case the court took judicial notice, without knowledge on the part of the respondent that it would be done, of many matters, among them the following: "That said respondent left the city of Columbus for his home in Cincinnati, Ohio, on or about the 29th day of February, 1888, under the promise to counsel for the State in the said trial then pending to return as a witness upon a telegram at any time one might be sent him; that he received such telegraphic notice, and answered it on the 5th day of March, 1888, that he would attend as such witness on the following day; that instead of so attending he purposely went beyond the limits of the State of Ohio, to evade the service of process of any kind from this court upon him, and so remained until the end of the trial aforesaid; that said respondent attended said trial, and drew his pay as a witness for said defendant, from said 24th day of January, 1888, until the 1st day of

March, 1888, and then absented himself without leave, and in violation of the order of the court, until said trial ended, and has since, to-wit, on the 7th day of April, 1888, been tried and adjudged by this court in contempt, and fined for such absence, and has paid such fine and costs." It was competent for the court to take judicial notice of pertinent facts connected with the transaction which came within the cognizance of his own senses. But when the court assumed to take judicial notice of the facts which formed the ground of a previous proceeding for contempt against respondent, and of his being adjudged guilty, we think the court erred. If the facts were competant to be taken into consideration,—which is, at least, very questionable,—they were the subject of evidence, and could not be judicialily noticed. Proof of a previous like offense is not competant evidence save in a small class of cases, where guilty knowledge is a necessary element to be shown by the State; and such proof was not necessary in this case. Beyond this, the proceeding there noticed could have been heard before any other judge of the court, and, had it been, the impropriety of taking judicial notice of what was proven, and of the result, would be apparent to every one; and it is none the less so from the fact that the proceeding may have been heard by the judge who tried the case in review. The consideration of this incompetent matter was calculated to have a potent influence in determining the sentence imposed. In a case where the penalty is limited by statute, and the sentance is the lowest allowed by law, and where, upon the whole record, the punishment seems justified, a reviewing court might not feel it a duty to disturb the judgment for an error of the character referred to. But in a case where the penalty is discretionary, and it appears, as in this case, upon the whole record that the punishment is severe, and the court cannot say that the incompetant matter did not affect the degree of punishment inflicted, we feel compelled to reverse the judgment, and remand the cause for further proceedings. Judgment accordingly.

NOTE.—This case is one of considerable importance, on the subject of contempt, in this great newspaper age, when the power of the press seems to be the great king before whom all must bend its knee. And from the absence of citation of authority it may be safe to presume it is not one of frequent occurrence—or at least it has not often reached a court of final resort. Judge Pugh, of the lower court, in an exhaustive opinion of over 12 double column pages of the *Weekly Law Bulletin*, Vol. 19, 302-314, ably reviewed many involved questions. That decision will be liberally drawn from in these comments. One of the points made was that in cases of contempt the defendant is entitled to a trial by jury, and especially that he cannot be tried by the judge against whom the contempt is committed. "Only one case," says Judge Pugh, "has been cited to support this view, an Illinois case—the Story case—reported in 79 Ill. 45. In the opinion delivered by Judge Schofield, the two chief reasons assigned for the decision, as I now recollect, are, first, that a judge against whom an attack is made in a newspaper would be unfit to try it; and, second, that a respondent in such a case is entitled constitutionally to a trial by jury. If the first reason was a reason at all, it would compel courts to abdicate their power in every case when the judge of the court was the person assailed, and through whom the contempt was committed. If some ruffian should step into the court-room and knock the judge off his seat, upon a parity of reasoning the judge would be unfit to try the case against him. The inconclusiveness of this argument is obvious—no diagram is needed.

The constitutional question whether a respondent is entitled to have a case of contempt tried by a jury, has been expressly passed upon by the highest courts of not less than nine States of the Union, whose constitutions are just as jealous of the right of trial by jury, and just as explicit in guaranteeing that right as in the constitution of Ohio. Every one of these courts, except one, has decided against the claim of respondent to a trial by jury. One reason given for these decisions, and an unanswerable one too, is that the guaranty of trial by jury in the constitutions of the different States only applies to cases which were triable by jury at common law. Judge Cooley, in the last edition of his Constitutional Limitations, page 390, note 3, on the subject, says: "Causes of contempt were never triable by jury, *and the object of the power would be defeated in many cases, if they were.*"

In Gandy v. The State, 13 Neb. 446, in which the charge was that the respondent, out of the presence of the court, endeavored to corrupt a jury, the court held: "As the proceeding is solely to protect public justice from obstruction, the accused is not entitled to trial by jury."

In Crow v. State, 24 Tex. 12, in which the act of contempt was done out of the presence of the court, the highest court of that State said: "It is not proper to call a jury to try a question of contempt."

In *Ex parte* Grace, 12 Iowa, 208, in which the contempt was also done outside of the court, it was adjudged: "The power to punish contempts without the intervention of a jury, is inherent in every court." And the court, in that case, distinctly held that a trial without a jury was not an infringement upon the ninth article of their constitution, which, with just as careful and differential choice of words as are employed in our constitution, secures to every citizen of that State the right to a trial by jury.

In Neal v. The State, 4 Ark. 257, the supreme court said: "In a proceeding of contempt the party is not entitled to trial by jury." It has been seriously argued that this proceeding ought not to be entertained, because both the criminal and civil law afford adequate remedies for the alleged libel of the respondent, namely, a prosecution for criminal libel and a civil suit for damages, by the judge of the court. Such an argument is a delusion and a snare. The West Virginia Court of Appeals has, in no ambiguous language, spoken on this subject, and it is so pertinent that I will borrow what is so well and tersely said. Hear what a unanimous court has said. "Such a suggestion is disgusting to a man of honor. It will be a sorry day when the practice shall obtain among judges of courts of last resort, who hold the dearest interests of the people in their hands, when, in their judicial capacity, they may be grossly libelled, to leave their high positions and go before a jury in a libel suit, be subjected to the coarse criticism of defendant's counsel, and if they succeed in their suit, have it cast in their teeth that they were influenced by sordid motives. Who should have any respect for a judge who would pursue such a course?

Would he not, under such circumstances, deserve the contempt of every good citizen? Besides, what right would he have individually to recover damages for a wrong committed against him in his judicial capacity, for an injury done the people in his person. In such cases the individual must be separated from the judge. The court has no right to punish for contempt one who libels an individual who happens to be a judge, but it is a contempt of court, as such, and an insult to the people represented by the courts, which alone the *court can* punish as such. Scarcely less repulsive to all sense of judicial dignity is the suggestion that the judge should play the role of prosecutor in the trial of an indictment for libel. If that day shall ever come when such shall be the only protection left the courts of justice against publication affecting the judicial integrity, none but the base and vicious can be expected to occupy judicial positions." * * One of the counsel stated thatin every case, historically speaking, in which the judiciary engaged in a conflict with the press disaster to the court followed, and that in some cases impeachment followed. That may have been true in some cases, but in a majority of cases, history does not sustain the statement. The most recent illustration of the opposite of the statement is the anarchist's case in Illinois. The possibility intended that this court may be impeached for whatever judgment he may render in the case, has no terror for him. What is conceived to be right will be done; what the court thinks is law will be announced and enforced, and consequences personal to the judge must take care of themselves. There is much danger, and more danger in fact from the abuse of the right to speak and write by scandal mongering writers, than there is from the exercise of any discretionary power in contempt cases by an elective judiciary. There is more peril to our free institutions from the first source, than from the second. The freedom of speech and liberty of the press have been appealed to, and the contention has been made that, if the defendant should be punished upon this charge, it would be an infringement upon that provision of the constitution guaranteeing those rights. The court is not unmindful of those great rights. But freedom of speech and licentiousness of speech are not synonymous. Freedom of speech and liberty of the press are not absolute. They are like all other rights, subject to regulation and restraint of law. As Mr. Wirt said in the Peck impeachment case, the freedom of speech and liberty of the press like all other human blessings, require the purifying and conservative principle of restraint: 'The right to criticise courts and judges and their actions in respectful language, either by way of argument, comment, or ridicule, is undeniable. But criticism and ribaldry are not equivalent. And upon the subject, as what constitutes the liberty of the press, I refer to a passage from page 403 of 16 Arkansas: In that case the court said: "Any citizen has the right to publish the proceedings and decisions of the court, and if he deem it necessary for the public good, to comment upon them freely, discuss their correctness, fitness, or unfitness of the judges for their stations, and the fidelity with which they perform the important public trusts reposed in them. But he has no right to attempt by defamatory publication to degrade the tribunal, destroy public confidence in it and encourage the community to disregard and set at naught its orders, judgments and decrees. Such publications are an abuse of the liberty of the press, tend to sap the very foundations of good order and well being in society, by obstructing the course of justice. If a judge is really corrupt and unworthy of the station which he holds, the constitution has provided an ample remedy by impeachment or address, where he can meet his accusers face to face, and his conduct may undergo a full investigation. The liberty of the press is one thing, and *licentious scandal* is another. The constitution guarantees to every man the right to acquire and hold property by lawful means, but this furnishes no justification to a man to rob his neighbor of his lands or goods."

Quoting from McLean, C. J., in the Oswall case (Penn.) the court said: The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due the peace and dignity of society to inquire into the motive of such publications and to distinguish between those which are meant for use and reformative, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description it is impossible that any good government should afford protection and immunity; it was a contempt case in which these doctrines were expounded. * * In Cooley on Constitutional Limitations, I find the following language as used by Gen'l. Hamilton: "The liberty of the press consists in publishing the truth, from good motives and for justifiable ends, though it reflects on governments or magistrates. A man who speaks in a newspaper has no greater right than he who speaks out of it. A newspaper is no sanctuary behind which a person can shield himself for breaking the law." What Chancellor Walworth said on this subject is appropriate. "It has been urged upon you that conductors of public press are entitled to peculiar indulgences, and have special rights and privileges. The law recognizes no such peculiar rights, but such as are common to all. They have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehood, to the injury of others, with impunity." King v. Root. 4 Wend. 113. But the whole of this argument about the liberty of the press, and the freedom of speech might be disposed of by simply reading the qualification of the constitutional right, in the language of the constitution itself, namely, that the respondent is responsible for the abuse of this right. He is not charged here with exercising the right of freedom of speech, or availing himself as a member of the press, of its liberty; he is charged with abusing that right and that liberty. One of the counsel for respondent argued with some tenacity that, as the charge was, that the respondent libeled the court for past conduct he was not responsible; and he also declares that there was no case at common law where one was held responsible in a contempt for libeling a court, and that the court had no common law power to punish a man for such act. Upon all these subjects, the Supreme Court of Arkansas has had something to say. In 16 Ark. page 384, in the case of State v. Morrill, the fourth paragraph of the syllabus reads as follows: "*By the common law*, courts possesed the power to punish, as for contempt, *libelous publications* upon their proceeding pending or passed, tending to degrade the tribunals, destroy that public confidence and respect for their judgments and decrees, so essential to the good order and well being of society, and to obstruct the free course of justice."

Blackstone also has had something to say upon this subject. In 16 Ark. p. 393, the following language from him is quoted: "Some of these contempts may arise in the face of the court as by rude and contemptuous behavior, by obstinacy, perverseness or prevarication; by breach of the peace, or any wilful disturbance whatever; others in the absence of the party, as

by disobeying or treating with disrespect the kings writ, or the rules or the process of the court, by perverting such rules or the process to the purposes of private malice, extortion or injustice, *by speaking or writing contemptuously of the court or judges, acting in the judicial capacity, by printing false accounts (or even true ones without permission) of causes then depending in judgment*, and in short, by anything that demonstrates a gross want of that regard and respect which when once courts of justice are deprived of their authority (so necessary for the good order of the kingdom), is entirely lost among the people. As to the attempted distinction between past and present or future conduct of the court, and as bearing upon that subject what judge Dade said in the Danbridge case is instructive. The general court of Virginia, which was the highest court of that State at that time, through Justice Dade (2 Vir. cases 409), said: Upon this part of the subject, and in reference to the cases having an indirect bearing on the present question a distinction is attempted for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the *prospective* conduct of the judge, but not for such as touch his *past* conduct. In reason, I can see but one pretense, for the distinction: Threats, and menaces of insult, or injury to a judge, in case he shall render a certain judgment, may be considered as impairing his independence and impartiality in the particular case to which the threats refer. And if the power of punishment would stop here, a curious consequence may ensue. A man may be attacked for threatening to do that for which he could not be attacked when actually done. But if (the judgment having been actually rendered) the insult be actually offered an attachment no longer lies; because the contempt is in relation to the past conduct of the judge, and to a case no longer pending. A recurrence to the original principles, the only true test, demonstrating that the weight, authority and independence of the court may be equally assailed either way, will prove that the distinction is merely ideal.

In this case (the Danbridge case), the judge being about to enter the court house for the purpose of opening court, Danbridge standing on the steps of the court house outside of it, grossly insulted him, charging him with corruption and cowardice in delivering an opinion in a cause at the previous term of the court, in which Danbridge had some interest. There are other interesting points dwelt upon by the able common pleas judge which space will not allow to be repeated here. The contempt in this case was what is termed a constructive contempt, and the respondent could not be fined or imprisoned without a hearing. The case of *In re* Terry, 9 S. C. Rep. 77, 36 Fed. Rep. 419, which has been recently brought to public attention by the killing of Judge Terry, was a contempt of a different class. In that case on the 3d of September, 1888, in open court and in the presence of Justice Field, United States Circuit Judge Sawyer, and District Judge Sabin, Sarah Althea Terry, the wife of Judge Terry on account of misbehavior was ordered to be removed from the court, and when the marshal attempted to execute the order, he was resisted and assaulted by Judge Terry with a knife. For this without giving Terry any notice or opportunity to be heard, the court sentenced him to six months' imprisonment. An action of *habeas corpus* was brought in the United States Supreme Court, where it was held that where a contempt had been committed in the presence of the court, an order of committment therefor may be made without notice to the offender, and without giving him an opportunity to be heard. And where the offender, immediately after committing the contempt, leaves the court room, going into another room in the same building, the court still has jurisdiction, at least on the day of the offense, to order his arrest and imprisonment without first ordering an attachment to bring him before the court.

For interesting article on contempts see 2 Cent. L. J. 358; 22 *Id.* 464; 15 *Id.* 42; 20 Am. Law Reg. 81-1425; 7 Alb. Law Jour. 129; 12 *Id.* 28, 213; 26 *Id.* 201.

WM. M. ROCKEL.

JETSAM AND FLOTSAM.

CHALLENGING JURORS.—The London *Law Times* of September 7 says: "The trial at Chicago of certain persons charged with the murder of Dr. Crinin recalls attention to the form of challenging the jurors. The statutes of the State of Illinois provide that if a person has read an account in a newspaper of the crime with the commission of which the accused is charged, it shall not be allowed to challenge him as a juror if he states on oath that he believes he can give an impartial verdict according to the sworn evidence. In the Cronin case the presiding judge has permitted the following four questions to be put to proposed jurors who had read newspaper reports: Do you believe that Dr. Cronin was driven away in a buggy hired from stableman Dinan by Coughlin? Do you believe Burke was one of the tenants of Carlson cottage, and that Dr. Cronin was killed there? Do you believe Dr. Cronin was killed pursuant to the appointment of the Trial Committee in Camp 20 of the so-called Clan-na-Gael Society? Do you believe a conspiracy had been formed, and that any of these defendants belonged to that conspiracy? According to Hawkins's Pleas of the Crown, in England a juror may be examined on the *voir dire* as to his qualification or affection, but not as to matters tending to his own discredit, nor as to having expressed an opinion as to the guilt of the defendant. But in the case of Reg. v. Cuffey, tried at the central criminal court in September, 1848, in which the prisoners were charged with treason felony under 11 Vict., ch. 12, the latter question was asked, the attorney-general not taking objection on behalf of the Crown."

ATTORNEY AND BARRISTER.—Lord Coleridge, recently addressing the law students of Birmingham, England, adverted to the American practice with reference to allowing the functions of attorney and barrister to be exercised by the same person, and said it was true that in the great cities of America, where there were firms of lawyers, the principle of natural selection sent some of the members of the firm into court and kept others in chambers, so that the practice modified the principle, but the principle remained, and he believed the extension of it to England was not —whether they liked it or not—very far off. Whether it would be a benefit or no, he felt by no means sure. He once asked Mr. Benjamin, who had experience of both systems, which upon the whole he thought the best. He replied that the question was one which could not be answered in a word. "If," he said, "you ask me which is best fitted for producing from time to time a thousand or a score very eminent, highly cultivated men—men fit to play a great part in public affairs, and to stand up for the oppressed and persecuted in times of trouble and danger—I should say

at once the English. If you ask me which is best in ordinary times to the vast majority of clients, I answer, equally without hesitation, the American." That was very weighty and very important evidence, and he thought if Mr. Benjamin was right that what was clearly for the benefit of the vast majority of clients was certain to be established in the end.

ASSAULTS ON JUDGES.—The assault on a judge of the Supreme Court of the United States, with its tragic termination, and the recent disgraceful mobbing to which Mr. Justice Stephen was subjected at Liverpool, remind us of the remarkable exemption which our judges have hitherto enjoyed from the risks arising from the desire for revenge of disappointed suitors. With the exception of the rotten egg which was thrown at the late Vice-Chancellor Malins (and which he mildly remarked must have been intended for his brother Bacon), and the attempted assassination of the late Sir George Jessel by Dodwell, in 1878, we do not recall any instance in recent years of an assault on any judge exercising civil jurisdiction. And even in earlier times the instances of attacks on judges are few. In 1616 Sir John Tyndal, one of the masters in chancery, was killed by a shot fired at him while entering his chambers at Lincoln's-inn, by a man called Bertram, against whom Sir John had given a decision. The assassin committed suicide before he could be punished. A few years afterward a prisoner condemned for felony at the Salisbury assizes threw a brick-bat at Chief Justice Richardson, which narrowly missed him. The offense in this case met with prompt punishment. An indictment was immediateiy prepared against the prisoner: his right hand was cut off and fixed to the gibbet on which he was himself immediatly hanged in presence of the court. 2 Dyer, 188b. Considering the number of litigants who must every year be almost driven to desperation by the loss of their cases, and the severe censures which the judges have constantly to bestow on the conduct of individuals, the immunity of the bench from personal injury is remarkable, and can only be ascribed to the respect for, and confidence in, the administrtion of justice in this country which has happily (until recently) been universal. What will be the result upon this of the preposterous re-trial of the Maybrick case by the daily papers and public meetings, remains to be seen, but it is to be observed that a great part of the clamor is directed personally against the judge who tried the case.—*London Solicitors Journal.*

ADVICE TO A YOUNG LAWYER.

Be brief, be pointed; let your matter stand
Lucid in order, solid, and at hand;
Spend not your words on trifles, but condense;
Strike with the mass of thought, not drops of sense;
Press to the close with vigor, once begun,
And leave (how hard the task!)—leave off when done.
Who draws a labored length of reasoning out,
Puts straws in line for winds to whirl about;
Who drawls a tedious tale of learning o'er
Counts but the sands on ocean's boundless shore.
Victory in law is gained, as battles fought,
Not by the numbers, but the forces brought.

Lyrics of the Law.

RECENT PUBLICATIONS.

FEDERAL DECISIONS. Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Comprising the Opinions of those Courts from the Time of their Organization to the Present Date, together with Extracts from the Opinions of the Court of Claims and the Attorneys-General, and the Opinions of General Importance of the Territorial Courts. Arranged by William G. Myer, Author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XXX. Index and Table of Cases. St. Louis, Mo.: The Gilbert Book Company. 1889.

This volume contains the Index and Table of Cases to the preceding twenty-nine volumes of reports known as Myer's Federal Decisions. It is needless to say that it is carefully and accurately prepared, as the work throughout the series partakes of that character. As each volume has from time to time made it appearance, we have taken pleasure in commending it to the profession, and commenting upon its contents. But the reports, as a whole, we consider of such value to practitioners, especially in the Federal Courts that it does not seem irrelavent, at this time, to congratulate the editor and publisher upon their successful completion and in an abbreviated way to review their general plan and scope. These volumes are intended to and do report all opinions filed in the Federal Court from their institution to July 1, 1883, though Vol 25 on Patents, covers cases to January 1886, and Vol. 23 on Maratime Law includes cases to January 1888. The cases are reported not as is customary, in the order of their filing, but according to their subjects alphabetically arranged. Thus Vol. 1 and 2, includes all topics under A, for instance Actions, Affidavits, Arbitration and Award, Appeals and Writs of Error. Vol. 3 embraces the subjects of Bailment, Banks and Banking, and Bill and Notes. Vol. 4 is entirely devoted to the subject of Bonds, official, municipal and penal. Vol. 5 treats of Carriers. Vol. 6 of Constitutional Law. Vol. 8 of Contracts, and Vol. 9 of Conveyancing, and so on. Each topic comprises all the decisions of the Federal Courts on the subject, and as the opinions are given in full and embrace those of Marshall, Story, Washington, Lowell, Blatchford and Dillon, the value of the reports can be readily understood. Few text contain as much law on the several subjects embraced in these volumes, and the authority of the decisions and their admirable arrangement make the series invaluable to the practitioner.

QUERIES AND ANSWERS.

QUERY NO. 15.

[*Subscribers are invited to send short answers to the following.*]

A purchased a lot valued at $1,500, paying $500 cash, balance due in one and two years. A few months after the purchase of said lot A died, and his wife bought it in at trustee's sale paying balance and getting title in her name. During the life of A, and a short time before his death, he contracted a bill for necessaries which were unpaid. There was no probate proceedings on his estate. Can the property of A's wife in this case be charged for the necessaries urnished, under § 3295, Rev. St. of Mo.? M. & G.

QUERY NO. 16.

Can a Chinaman be naturalized? Cite authority.

T. H. M.

QUERY No. 17.

"This is to certify that in case of my death that my beloved wife has full power to do as she pleases with all my property, now in my possession or which may hereafter come into my possession." "I declare this to be my last will." "Signed in the presence of God." Is this instrument, dated and duly signed, entirely in handwriting of testator, a good will? The question is, are the words "my wife has full power," etc., sufficto pass testator's entire estate to her by will. Give authority, if any.

T. S. R.

QUERY No. 18.

In 1883 A, as the administrator of H, filed a petition to sell real estate, and under said petition made a sale, the highest bidder being the widow of H. In April of 1883, A as administrator conveyed by deed said premises to the widow of H. Sometime after the widow made a verbal agreement with one C, he to go upon said premises; he agreed to pay certain tax claims then outstanding, and make monthly payments, which he did not do, and continued to hold possession. In the meantime, said premises were sold for taxes and and a tax deed given to one D. D made a quitclaim deed to T. T made a quitclaim deed to J. C borrowed from one D $100 to pay off J, and gave a quitclaim deed to I. Sometime after I deeded said premises to one B, said B after receiving said deed notified said C to vacate the premises, upon receiving said notice he now comes into court and prays that said deeds, viz: Deed from T to J, and from J to I be declared to be a mortgage; and also prayed for an injunction restraining said B from taking possession, which was granted. With leave of court I made the widow of H a party defendant, and answered said bill, claiming said C was in possession as owner, but was in possession as a tenant under a verbal agreement. I cannot file a cross-bill as my client is not in possession, and I cannot commence forcibly entry and detainer as an injunction is now standing for the same proceedings. I would like to know what kind of a bill I should file to establish my rights to said property, and get possession of the same.

F. W.

QUERY No. 19.

"In 1887 the legislature of Dakota passed a law giving to persons furnishing seed grain, a lien on the crops raised from such seed, for the purchase price thereof, which should have priority over all other liens and incumbrances created subsequent to the passage of said act. In 1889 the legislature passed a similar law giving to threshers a lien for their services on grain threshed by them, having priority over all other liens and incumbrances created subsequent to the passage of that act. A holds a chattel mortgage on certain grain to secure the payment of $450, which mortgage was given subsequent to the passage of the seed lien act, but prior to the passage of the act giving the thresher a lien. B holds a seed lien on said grain for $150 acquired subsequent to the date of A's mortgage, but which under the provisions of the seed lien law has priority. C holds a thresher's lien on said grain for $75, which under the operation of the thresher's lien law is inferior to A's mortgage, but superior to B's lien. Said grain is worth but $300. What are the respective rights of A, B, and C in said grain? Cite authorities."

B. & F.

QUERIES ANSWERED.

[*To be found in Vol. 29, Cent. L. J. p. 174.*]

In answer to query No. 14, as to whether chattel mortgage given in Kansas will hold the property after removal to Missouri, I answer that it will, and cite following authorities: 22 Kan. 97; 6 Pac. Rep. 265; 30 Mo. 380; 62 Mo. 524; Jones on Chat. Mort. § 299.

W. N. P.

HUMORS OF THE LAW.

CUMULATIVE DAMAGES.—An action was brought in a Wisconsin court some years since for shooting the plaintiff's goose and gander. The defendants admitted the killing, but claimed that it was accidental. After hearing the evidence, the court delivered the following able and lucid opinion:

"It is always best not to be too severe on damages, and yet it is best to give damages to the amount of the plaintiff's claim, and inasmuch as the killing of those geese was wrong by the boys it is the opinion of the court that the two geese were worth $2 apiece in the spring of the year, and in all probability they would have had twelve goslings, and probably about one-half of them would have lived and the other half would have died; and it would not have cost the plaintiff much to keep them until fall, and the goslings would then be worth $1 apiece, which would be $6, and the two old ones $2, which would make $10, which is the judgment of the court."

"PRISONER, luckily for you, you have been found not guilty by the jury, but you know perfectly well you stole that horse. You may as well tell the truth, as no harm can happen to you now by a confession, for you cannot be tried again. Now, tell me, did you not steal that horse?"

"Well, my Lord," replied the man, "I always thought I did, until I heard the speech of my counsel, but now I begin to think that I didn't.

A SON of the Emerald Isle, who had been badly injured in a railway accident, called to consult an attorney as to what action he could take against the company.

"Sue them, my dear sir," said the lawyer, "sue them for heavy damages."

"Sue them for *damages!*" exclaimed Pat, "shure and I have had *damages* enough already. Faith, and I think I had better sue them for *repairs!*"

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMIRALTY— Collision. — For a steamer whose full speed is twelve knots an hour, and which is near the entrance to New York harbor, in a thick fog, a speed of five and one-half to six knots per hour is not the "moderate speed" required by art. 21 of the new international rules.—*The Martello*, U. S. C. C. (N. Y.), 39 Fed. Rep. 505.

2. ADMIRALTY— Collision. — A steam vessel, which is bound to keep out of the way of another steamboat, will be held in fault if collision happen through her delay in backing, where the circumstances of wind and tide and signals exchanged were sufficient to have shown her that such backing could not be delayed without risk of collision.—*The York, etc. R. Co. v. The Breakwater*, U. S. D. C. (N. Y.), 39 Fed. Rep. 511.

3. APPEAL—Review. — Where an appeal is taken from a judgment for want of findings, and the record discloses no findings, but also fails to show that they were not waived, waiver will be presumed, and the judgment will be affirmed. — *Goyhinech v. Goyhinech*, Cal., 22 Pac. Rep. 175.

4. APPEAL—Review.—In a case where appellants are not required to do anything by the judgment, the filing of the statutory undertaking on appeal *ipso facto* operates as a *supersedeas*, staying all proceedings on the judgment.—*Born v. Horstmann*, Cal., 22 Pac. Rep. 169.

5. APPEAL—Practice.— Under Comp. St. Mont. subd. 3, § 208, requiring that a statement upon a motion for a new trial shall be signed by the judge, "with his certificate to the effect that the same is allowed," a statement on motion for a new trial to which no such certificate is attached will be disregarded on appeal.—*Scherrer v. Hale*, Mont., 22 Pac. Rep. 151.

6. ARREST—Civil Process.—Under Gen. St. Nev. §§ 3839-3840, providing that when the judge of the district court is satisfied that any debtor imprisoned under civil process has not property subject to execution of the value of $50 he shall issue an order dischargidg him from custody, the evidence was sufficient to authorize the issuance of such an order discharging defendant.—*Deal v. Schlomberg*, Nev., 22 Pac. Rep. 155.

7. CLAIMS — United States. — A claim of a citizen of France against the United States for cotton taken during the civil war was, under a treaty between the two nations, submitted to a commission for adjudication, by his widow and administratrix. The commission found and reported the sum due, but withheld one-sixth of the amount for the reason that one of the three heirs of the claimant was an American citizen, whereupon the heir sued the United States for her portion so withheld: *Held*, that plaintiff had no cause of action, as, if any existed, it accrued to the administratrix. — *Bodemuller v. United States*, U. S. D. C. (La.), 39 Fed. Rep. 437.

8. CONSTITUTIONAL LAW. — The statute of a State requiring the inspection of a commodity so as to ascertain and secure a proper measurement is an inspection law, within the meaning of the constitution of the United States. The term "import," as used in that clause of the constitution which says that "no State shall lay any imposts or duties on imports or exports," does not refer to articles imported from another State, but only to articles imported from foreign countries into the United States.—*State v. Etc. Coal Co.*, La., 6 South. Rep. 220.

9. CONSTITUTIONAL LAW. — The provisions of act Ind. March 4, 1889, which attempts to create a new system of law reporting in which the judges shall prepare the syllabi, are so interdependent that the unconstitutionality of the requirement as to the syllabi renders the whole act void.—*Griffin v. State*, Ind., 22 N. E. Rep. 7.

10. CONSTITUTIONAL LAW—Imprisonment.—Const. Cal. art. 11, § 11, provides that any county, city, or town may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws: *Held*, that this provision does not authorize county supervisors to put a prisoner to hard labor where his imprisonment is for the purpose of collecting a fine, because to do so would be to add to the judgment of the court. — *In re Filki*, Cal., 22 Pac. Rep. 146.

11. CONSTITUTIONAL LAW.—Under Const. Cal. 1879, art. 3, § 1, the power of appointment to office is not exclusively an executive function, but, so far as it is not regulated by express provisions of the constitution, may be regulated by law, and, if the law so prescribes, may be exercised by the legislature; and Pol. Code Cal. § 2292, providing for the election of a board of trustees, to control the State library, by the legislature in joint convention assembled, is constitutional. — *People v. Freeman*, Cal., 22 Pac. Rep. 173.

12. CONTRACT—Condition.— Plaintiff contracted to excavate a tunnel 1,200 feet in length for a certain sum, defendants agreeing "to receive said tunnel 100 feet at a time, and pay" plaintiff "$1,000 upon the completion of each 100 feet." Defendants paid on completion of the first 100 feet, but failed to pay for the second 100 feet, and plaintiff discontinued the work: *Held*, that he could recover for the work already done and materials furnished, the payment of the $1,000 being a condition precedent to the further prosecution of the work. — *Bennett v. Shaughnessy*, Utah, 22 Pac. Rep. 156.

13. CORPORATIONS—Stockholders. — A bill against the stockholders of a certain corporation alleged that complainant, a corporation, had purchased all the assets and properties of defendant's corporation; that the vendor had fraudulently misrepresented the value of the property, and the defendants, as stockholder, had received their proportionate shares of the proceeds of the sale and the other assets of the company which came into their hands as a trust fund for the satisfaction of complainant's claims; and prayed that the defendants be required to account for and pay over so much of such assets as might be necessary to ssatisfy complainant's demands: *Held*, that as the action was primarily an action against the vendor corporation for damages for fraudulent representations, the corporation was a necessary party.— *Swan Land, etc. Co. v. Frank*, U. S. C. C. (Ill.), 39 Fed. Rep. 456.

14. COVENANTS—Mistake. — Where the mistake of one party as to the land to be conveyed under an oral agreement is in misunderstanding that the other owned and agreed to sell certain land, and not as to the contents of the deed or its legal effect, and the mistake of the grantor is in supposing that the deed did not contain nor convey land he did not own, it is a mistake as to the subject matter of the contract, and not a "mutal mistake" concerning the contents or legal effect of a written instrument. — *Page v. Higgins*, Mass., 22 N. E. Rep. 63.

15. CRIMINAL LAW— Cruelty to Animals. — The act of October 12, 1879, as embodied in the Code § 4612*a*, makes it a misdemeanor to engage in any act of cruelty to any domestic animal; and to "cruelly drive and cruelly treat" one or more horses is an offense under the act.—*McKinne v. State*, Ga., 9 S. E. Rep. 1091.

16. CRIMINAL LAW— Homicide. — If a man, whose life has been threatened, meets and slays his adversary under such circumstances as show that at the time his adversary was making some demonstration indicating an intention to then execute his threats, and that he believed, and had reasonable ground to believe, that his life was then in danger, or at he was in danger of

great bodily injury, such homicide is justifiable, although it may turn out that the deceased had no intention at the time to execute his threats. The party threatened is to judge from the circumstances by which he is surrounded and as they appear to him; but when a man acts upon appearances, and takes the life of his fellow-man, he does it at his peril, and he cannot justify such killing unless there are circumstances which would induce a reasonably cautious man to believe that it was necessary to save his own life, or to save himself from great personal injury.—*Smith v. State*, Fla., 6 South. Rep. 482.

17. CRIMINAL LAW— Confessions. — Before the confessions of a party charged with crime are admissible in evidence against him, it must be clearly shown that such confessions were free and voluntary, and the confessions of the accused should be acted upon by courts and juries with great caution. When a confession has been obtained through illegal influences, such influences will be presumed to continue and color all subsequent confessions, unless the contrary is clearly shown.—*Coffee v. State*, Fla., 6 South. Rep. 493.

18. CRIMINAL LAW—Malicious Mischief. —On a trial for maliciously maiming a pig, in violation of Comp. Laws Utah 1888, § 4708, which makes it a misdemeanor for any person to maliciously kill or maim an animal, the property of another, the fact that defendant did not know the owner of the pig does not call for a charge to acquit on the ground that no malice is proved, and it is proper to instruct that malice may be inferred from the circumstances, and the testimony in the case. — *Territory v. Olsen*, Utah, 22 Pac. Rep. 163.

19. CRIMINAL LAW— Assault with Intent to Kill.—On a trial for assault with intent to murder, a charge requested by defendants that if they could have done the murder, but desisted of their own accord, the acts are not assault with intent to murder, and that if they began the assault with intent to murder, but desisted before the consummation of the intent, then they are not guilty, is properly qualified by adding, "unless the acts committed prior to desisting amount to assault with intent to murder."—*Young v. State*, Ga., 9 S. E. Rep. 1108.

20. CRIMINAL PRACTICE— Jurors.—Under Crim. Prac. Act Mont. § 287, par. 11, providing that having formed or expressed an opinion shall disqualify a juror, unless he has formed his opinion from the newspapers, and can state on oath that he feels able to decide the case impartially, where a juror states that he only knows of the case from the newspapers, that he may have formed an opinion, but that he is without bias, and can decide the case fairly, he is competent.—*Territory v. Bryson*, Mont., 22 Pac. Rep. 147.

21. DEEDS — Joint Tenancy. — The use of the words "joint tenants" in the appropriate places in a deed of conveyance is sufficient to create an estate in joint tenancy, under the statute of this State, without the use of the words, "and not an estate of tenancy in common," or their equivalent.—*Coudert v. Earl*, N. J., 18 Atl. Rep. 220.

22. DIVORCE— Homestead. — A wife had executed and recorded a declaration of homestead on certain land, and held possession under a decree rendered in a subsequent action for divorce, awarding the homestead property to her, "to be held by her in trust for her support and for that of her children:" *Held*, that no trust was created in the homestead property by such decree, but it passed an absolute title to the wife, under Civil Code Cal. § 146, subd. 3, which provides, in case of a divorce, that if a homestead has been selected from the community property it may be assigned to the innocent party, either absoutely or for a limited time, subject in the latter case to the future disposition of the court.—*Simpson v. Simpson*, Cal., 22 Pac. Rep. 167.

23. EASEMENT—Party-Walls.—Adjoining property owners, who claim under deeds from the same same original grantor, which provide that "the center of the easterly and westerly partition walls of the houses first erected on said land shall be placed on the division lines between the granted premises and the adjoining lots, and shall be good and sufficient walls, and the party first building such partition wall shall be entitled to receive from the party using the wall one-half of the actual cost," etc., have equal and mutual rights in relation to the erection of party-walls, and one may enlarge a wall and foundation previously erected by the other, where it appears that such enlargement is in accordannce with the building laws, and it is not shown that the original wall will be injured thereby.—*Matthews v. Dixey*, Mass., N. E. Rep. 61.

24. EQUITY—Elections.—Equity has no jurisdiction to enjoin commissioners of a county court from certifying to the governor the result of their canvass of the vote in their county for a representative in the congress of the United Stater.—*Alderson v. Commissioners*, W. Va., 9 S. E. Rep. 868.

25. EQUITY—Limitation of Action.—A suit in equity for an account founded on a covenant in a sealed instrument is not barred by a delay of more than six years from the last breach of the covenant.—*Lilliendhale v. Stegmair*, N. J., 18 Atl. Rep. 216.

26. EVIDECE—Parol.—In an action on a contract to sell plaintiffs all the cattle, of whatever kind or age, on defendants' ranches, except a certain number of steers, the contract being silent as to the class or ages of the steers reserved, where defendants refuse to deliver certain cattle, parol evidence is admissible to show that the steers reserved were sold to a third person, were of a certain age, not of the age of those which defendants refused to deliver, and that the parties understood this when contracting.—*Buford v. Lonergan*, Utah, 22 Pac. Rep. 164.

27. FEDERAL COURTS—Jurisdiction.—The limitation as to amount in a controversy necessary to give the circuit court jurisdiction, fixed by section 1 of the act of March 3 1887, (24 St. at Large), does not apply to suits in which the United States is plaintiff or petitioner.—*United States v. Shaw*, U. S. C. C. Ga., 39 Fed. Rep. 433.

28. FEDERAL COURTS — Following State Decisions.—Where the equity jurisdiction of the federal court is derived from a State statute, the construction put upon the statute by the State supreme court is binding upon the federal court.—*Beebe v. Lousville etc. R Co.*, U. S. C. C. Miss., 39 Fed. Rep. 481.

29. INFANCY—Removal of Disability.—2 Sayles' St. Tex. art 3361*a*, § 2 provides a procedure for the removal of the disabilities of a minor by filing a petition which may be heard by the court in term-time or vacation, and, if it shall appear to the court that it is advisable, or will be advantageous to the minor, to have his disabilities removed, the court shall enter a decree removing the same. *Held* that, as the proceeding is in *ex parte* one, and acts only on the *statute* of the minor, it cannot be deemed a judicial proceeding, but merely as the act of the judge, and hence there are no presumptions to be indulged in favor of the final order.—*Brown v. Wheelock*, Tex., 12 S. W. Rep. 111.

30. INJUNCTION.—On application for injunction, plaintiffs alleged that defendant was about to close an alley, and thereby deprive them of a valuable easement to their property. Defendant answered that the alleged alley was her private property, was closed at the time of plaintiffs' purchases, and that they bought with a full knowledge of these facts. The answer was supported by corroborating affidavits. *Held*, that the judge did not abuse his discretion in granting a temporary injunction till the case could be heard.—*Hughes v. McIntosh*, Ga., 9 S. E. Rep. 1110.

31. INJUNCTION.—Injunction will not lie to restrain the enforcement of judgments which petitioner alleges that he allowed defendant to obtain against him as administrator, on the latter's promise not to hold him liable, but only to hold the judgments as an older claim than a judgment which might be obtained in a suit then pending against petitioner by third persons, where de-

fendant's judgments are defective, and not enforceable until amended, especially as petitioner could set up the agreement in defense to a suit to enforce the judgment. —*Richardson v. Lumsden*, Ga., 9 S. E. Rep. 1109.

32. LIMITATION OF ACTIONS—Mistake.—Under Code Civil Proc. Cal. § 338, providing that an action for relief on the ground of fraud or mistake must be commenced within three years after the cause of action accured, such cause of action not to be deemed to have accured until the discovery of the mistake by the aggrieved party, a complaint for relief on the ground of a mistake which occured 30 years previous, and which is silent as to the time when such mistake was first discovered, is bad on demurrer. — *Smith v. Irving*, Cal., 22 Pac. Rep. 170.

33. LIMITATIONS OF ACTIONS.—The statute of limitations begin to run against a sealed agreement by defendant to execute notes at a specified time in payment for property purchased of plaintiffs, at that time, though in the same agreement plaintiffs covenant to convey the property to defendant at the same time and fail to do so.—*Davis' Adm'r v. McMullen's Adm'r*, Va., 9 S. E. Rep. 1095.

34. MASTER AND SERVANT.—Where in a suit by a brakeman to recover damages from a railroad company by which he was employed, for an injury received by an alleged defective draw-head on a car, the law as to the obligations of defendant, and the acceptance of risks and the degree of care required of plaintiff, is clearly set forth in the charge, the verdict of the jury will not be set aside on the ground that no negligence on the part of defendant was shown, where there was evidence that the draw-head was sunk four inches, and that the defect was old and plaintiff did not know of it.— *Seese v. Northern Pac. R Co.*, U. S. C. C. Minn., 39 Fed. Rep. 487.

35. MUNICIPAL CORPORATION—Police.—Act. Cal. April 1, 1878, §§ 9-13, providing that on the death of a police officer of San Francisco the city and county treasurer shall pay a certain sum to his legal representatives out of a certain fund created by such act, does not create a vested right in such sum during the life of such officer; and subsequent act, which repeals the former, passed before the death of such police officer, is not unconstitutional, as depriving him of property without due processof law.— *Pennie v. Ries*, Cal., 22 Pac. Rep. 176.

36. OFFICIAL BONDS.—Defendant H gave a bond as city treasurer a warrant—No. 92—on an award for danages to a certain lot was issued to one A, as owner, without knowledge of plaintiff's claim of interest therein, but on the discovery of such claim another warrant —No. 114—was issued to the owner or owners of said lot, and notice thereof given to defendant H. The money was illegally paid by defendant's deputy on warrant No. 92; and the fund was sufficient to pay only a part of plaintiff's share under warrant No. 114. *Held*, that the sureties on the bond were liable for the residue.—*Priet v. De la Montanya*, Cal., 22 Pac. Rep. 171.

37. PARTNERSHIP—Receiver.—Where a partnership has been dissolved, and the remaining partner is selling goods of the firm for which the purchase price is owing, there is no abuse of judicial discretion in granting an injunction and appointing a receiver, on the filing of a creditor's bill, the condition being that the debtor may, by giving bond, retain possession and continue the sales.—*Baker v. Mills*, Ga., 9 S. E. Rep. 1100.

38. PHYSICIANS AND SURGEONS—License.—Gen. Laws N. H. c. 132, providing that no person shall practice dentistry without having obtained a degree from some college, or a license from the State dental society, and imposing a certain fee, but exempting non-resident physicians when called into the State by professional duties, and persons who have resided and practiced the profession at their present place of residence for a specified time, is unconstitutional as unduly discriminating between persons of the same class.—*State v. Hinman*, N. H., 18 Atl. Rep. 194.

39. PRACTICE IN CIVIL CASES—Summons.—Service on an indorser of a note alleged to be a resident of H. county, made in M. county by process directed to the sheriff of M. county, is a proper service.—*Sanders v. City Nat. Bank*, Tex., 12 S. W. Rep. 210.

40. PRINCIPAL AND AGENT.—In a suit of a principal against a contumacious agent, for a settlement of accounts, and the recovery of the balance found to be due, in which the defendant claims reimbursement for certain expenditures, the *onus probandi* is on the latter, and he must show by a satisfactory preponderance of evidence that such disbursements were made for the account of the principal, and that the same were authorized or accepted by the principal; otherwise his claim for reimbursement will be denied.—*Western Assur. Co. v. Uhlham*, La., 6 South Rep. 485.

41. QUO WARRANTO—Elections.—An affidavit in an information in the nature of *quo warranto* to try title to an office, which is as direct and positive as the nature of the case permits in stating the facts on which the information is based, is not objectional because not stating that those facts are true within the knowledge of the affiant, as the object of such an affidavit is simply to inform the judge by whose permission the information is filed, that the facts exist which make its filing proper, and not for use on the trial.—*Hunnicutt v. State*, Tex., 12 S. W. Rep. 106.

42. RAILROAD COMPANIES—Construction.—A railroad company, authorized by its charter to construct its road in the usual manner, which procures by paying the agreed consideration a conveyance of the land over which the road is to be constructed, is not liable to the former owner for damages arising from the construc tion of the road where it has exercised reasonable skill and careful judgment in designing and constructing such road.—*Hodge v. Lehigh Val. R. Co.*, U. S. C. C. (N. J.), 39 Fed. Rep. 449.

43. RAILROAD COMPANIES—Subscriptions.—Where a railroad corporation obtains authority from the legislature to change one of its termini and to increase its capital stock without the consent of a subscriber to stock under the orignal charter, the latter is released from his subscription, though at the time thereof the general law, under which the first charter was obtained authorized amendments to the charter increasing the capital stock, and changing the route, as such law did not authorize a change in the termini.—*Snook v. Georgia Imp. Co.*, Ga., 9 S. E. Rep. 1104.

44. SALE—Delivery.—Evidence that the buyer of wood saw a portion of it as it was delivered from day to day, at the place designated in the contract, examined it there and made no objection, authorizes a finding of an acceptance of the wood examined, though it had not been measured.—*Small v. Stevens*, N. H., 18 Atl Rep. 196.

45 SALE—Rescission.—Where the first lot of wood delivered under a contract is not of the stipulated quality, the purchaser may rescind the contract, and is not bound to accept the seller's offer either to take it at a reduced price, or to sort the wood to conform to the contract.—*Walker v. Davis*, N. H., 18 Atl. Rep. 196.

46. SPECIFIC PERFORMANCE.—A complainant in an action for specific performance may prove the contract on which he relies by letters, but to warrant the court in holding the letters to be a contract it must appear that the writer parted with them as evidence of the terms of the contract to which he assented. They must contain all the material terms of the contract, and show that the parties understood the terms of the con tract alike.—*Potter v. Hollister*, N. J., 18 Atl. Rep. 204.

47. TAXATION — Constitutional Law. — The United States issued a patent for 640 acres of Moroni city under the town-site act, to which tract the city is confined, so far as is indicated by buildings, streets, or other improvements. The legislature of Utah included 16,000 acres of land within its corporate limits. Organic act Utah, § 6, provides that the authority of the legistature shall extend to all "rightful subjects of legislation consistent with the constitution of the United States." *Held* that, where defendant lived on farm lands outside

of the city, as shown by public or private improvements, and beyond such adjacent districts as would be benefited by its municipal expenditures, the act of the legislature subjecting his property to taxation for corporate purposes of the city was not "rightful" legislation, and was in violation of Const. U. S. amendment 5.—*Territory v. Daniels*, Utah, 22 Pac Rep. 159.

48. TENANTS IN COMMON.—Where plaintiffs and defendants are tenants in common in the fund of which an accounting is sought, and in the equitable ownership of the property in which the fund is invested, of which defendants are in possession, the statutes of limitations will not commence to run until their rights are dispnted or disturbed by defendants.—*McClure v. Colyear* Cal., 22 Pac. Rep. 175.

49. TRUSTS— Parlor Declaration. — A parol declaration of trust of personal property is valid.—*Pitney v. Bolton*, N. J., 18 Atl. Rep. 211.

50. TRUSTS.—Where a husband puts his wife's money into the purchase of land, with the knowledge of the vendor, the money being neither a loan nor a gift, and the land is sbsequently levied on to satisfy a judgment in favor of the vendor for a balance of the purchase price, a trust will be implied under Code Ga. § 2316 which provides that a trust is implied "whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another."—*Brooks v Fowler*, Ga., 9 S. E. Rep. 1089.

51. TRUSTEES—Where the duty of a trustee is involved in doubt, it is his right to ask and receive the aid and direction of this court.—*Traphagen v. Levy*, N. J., 18 Atl. Rep. 222.

52. USURY.—Voluntary services rendered by middlemen, through whose agency a loan was procured, in looking after the payment of taxes on the mortgaged property, and in collecting and remitting accured interest on the loan, will not render the loan usurious, the services, though beneficial to the middlemen, and being rendered in pursuance of a known custom of their business.—*Riley v. Olin*, Ga., 9 S. E. Rep. 1095.

53. USURY—Commissions.—Where the money actually lent belonged to none of the middleman engaged in procuring the loan, that the notes and mortgage were made payable to one of them, who shared in the commissions paid by the borrower, will not infect the loan with usury, the lender knowing nothing touching the payment or agreement to pay commissions, and having acted in person in contracting to make the loan, fixing the terms thereof, and accepting the security, and having parted with the full amount of the loan and delivered the money to one of the middlemen engaged in procuring it.—*Hughes v. Griswold*, Ga., 9 S. E. Rep. 1092.

54. USURY.— Payments made upon an usurious debt are to be deducted from the principal and lawful interest, where the suit is upon renewal notes executed after such payments, but without purging out the usury.—*McGee v. Long*, Ga., 9 S. E. Rep. 1107.

55. VENDOR'S LIENS.—Plaintiff sold land to M, taking his note secured by mortgage for the price. Before the notes were due, he sold the land to a married woman, taking her husband's notes in payment, with some shares of stock, the separate property of the married woman, as collateral security. Plaintiff at the same time transferred to his vendee the notes and mortgage of M: *Held*, that there being no fraud in the transaction, the vendor's lien was waived, though the pledge of the wife's stock to secure her husband's notes may have been invalid.—*Jackson v. Stanley*, Ala., 6 South. Rep. 193.

56. WATERS AND WATER-COURSES.— The dedication of a public park on the water front of a bay does not carry the park into the bay, except to the extent of accretions thereto. The submerged lands of the bay not disposed of by the State are her property, and are not subject to disposition by the owner of the land adjoining the bay.—*Ruge v. Apalachi, etc. Co.*, Fla., 6 South. Rep. 489.

57. WILLS—Construction.—Where a will provided that after the payment of the debts and legacies specified the residue of all the testator's property was to be held in trust for a certain period, and out of the rents and profits to be collected therefr om the executors were to pay to the widow such sum or sums as may be necessary for the support of such widow and the suport and education of the minor children, and the county court before such debts were paid, and while the estate was still unsettled, ordered the executors to pay a certain sum for such support and maintenance: *Held*, that as under the will the executors were not to pay such sum or sums for that purpose until the residue was ascertained and the trust invested, the court was not authorized to make the order. — *Jasper v. Jasper*, Oreg., 22 Pac. Rep. 152.

58. WILLS. — A power of sale annexed to a devise of the fee, to be exercised at the discretion of the devisee, and without designating any particular object for which it should be exercised, expires at the death of the devisee.—*Sites v. Eldredge*, N. J., 18 Atl. Rep. 214.

59. WILLS— Construction. — Where, by a will, land is imperatively ordered to be sold, without a time being fixed for the sale, it is considered as converted into money from the death of the testator, and gifts of such moneys are to be treated as legacies of personal property.—*Dutton v. Pugh*, N. J., 18 Atl. Rep. 207.

60. WILLS— Distribution. — Where a definite surplus remains in the hands of the trustee under a will in excess of the amount of certain unpaid legacies, after payment of the balance of the specific legacies and all debts and other charges against the estate, the distribution of such surplus among the residuary legatees will not be delayed because a trust, connected with such unpaid legacies, is not yet performed. — *Thyng v. Moses*, N. H., 18 Atl. Rep. 197,

61. WILLS— Construction. — Testator devised land to his illegitimate son "and his legitimate children forever," upon condition of payment of a certain annuity and his indebtedness to testator, "but if he will not pay the above annuity and what he owes me, and shall die leaving no legitimate child," then to S and her children; "but if she should die leaving no child," then to certain nieces and children of a nephew. The son paid the indebtedness and the annuity up to his death, intestate unmarried, and without legitimate children, leaving sufficient property to pay the annuitant during her life: *Held*, that he took an estate tail, enlarged by statute to a fee simple, which vested upon payment of the indebtedness and the annuity, but was defeated on his death without legitimate issue, and passed to S under the will.—*East v. Garrett*, Va., 9 S. E. Rep. 1112.

62. WITNESS — Decedent. — Where, in ejectment, defendant, who claimed under certain legatees under the will of plaintiff's grantor, contended that the deed from decedent to plaintiff was made in fraud of creditors, and redelivered to decedent in his life-time, and offered evidence by an uninterested witness to that effect, plaintiff, as a witness in his own behalf, is not competent to show that he gave up his deed to decedent to aid him in writing another, under Code Ga. § 3854, subd. 1, providing that, where one of the original parties to the contract or cause of action on trial is dead, the other party shall not be admitted to testify in his own favor. — *McBride v. McBride*, Ga., 9 S. E. Rep. 1111.

63. WILLS—Conditions. — A bequest to the Wisconsin Female College "provided that the trustees have changed the name before my decease to Downer College," cannot take effect unless a legal change in the corporate name has been completed before the death of the testatrix, whether the trustees have power to make such change or not. — *Merrill v. Wisconsin Female College*, Wis., 43 N. W. Rep. 104.